RECORD AND BRIEFS

No. 17-269

FILED
SEP 20 2017
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
# Supreme Court of the United States

STATE OF WASHINGTON,

*Petitioner,*

v.

UNITED STATES OF AMERICA, ET AL.,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## BRIEF OF *AMICI CURIAE* STATES OF IDAHO, KANSAS, LOUISIANA, MAINE, MONTANA, NEBRASKA AND WYOMING IN SUPPORT OF PETITIONER

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## INTEREST OF THE *AMICI CURIAE* STATES[1]

The interest of the *amici curiae* rests on perhaps the most basic tenet of the United States Constitution: the several States retain primary responsibility in our Union for ensuring that the interests of all their residents are protected. U.S. Const. amend. X. Discharging that responsibility requires them to make often difficult choices about how best to use their limited fiscal resources. Whatever balance they strike inevitably displeases some, with their political and occasionally judicial branches providing the mechanism for restriking that balance. Although federal law can limit the States' sovereign authority, U.S. Const. art. VI, cl. 2, stringent preemption standards apply to Congressional action when it legislates "in a field which States have traditionally occupied." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Indian treaties – like those here – can alter this standard because they must "be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians." *Jones v. Meehan*, 175 U.S. 1, 11 (1889). "But even Indian treaties cannot be re-written or expanded beyond their clear terms to remedy a claimed injustice or to achieve the asserted understanding of the parties." *Choctaw Nation v. United States*, 318 U.S. 423, 432 (1943).

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[1] In compliance with S. Ct. R. 37.2(a), counsel of record for all parties received notice at least ten days prior to the due date of this brief of *amici curiae*'s intention to file it.

This case involves, as an immediate matter, the last of those principles. The Ninth Circuit has plainly "expanded" the fishing clause in the Stevens treaties "beyond [its] clear terms" as definitively construed by this Court in *Washington v. Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658 (1979) (*Fishing Vessel*), to imply what a prior Ninth Circuit panel and commentators characterize as an "environmental servitude." It has further placed its imprimatur on a district court injunction effectively seizing federal judicial control over the Washington State culvert system but, of course, leaving the fiscal burden on the State to the tune of a billion-plus dollars.

While the Ninth Circuit decision's immediate impact pretermits the internal governance by one State over one program, it writes a script for subjecting a broad swath of regulation by States, including the *amici curiae*, to like servitudes. Two-thirds of the States contain Indian reservations or other Indian country established by treaty or statute. Conference of W. Att'ys Gen., *American Indian Law Deskbook* § 5:16, at 331 (West 2017). Tribal fishing or other subsistence rights, both on and off reservation, exist in many of those States. Under the Ninth Circuit's reasoning, a servitude on state land-use (and other) regulation can be *implied* to avoid negative impacts on such rights through generally applicable, non-discriminatory regulation (as the Washington culvert program concededly is). The *amici*'s concerns are not apocalyptical. The Environmental Protection Agency (EPA) has relied on the decision below to impose federal, rather

than state, water quality standards (WQS) in Maine and Washington insofar as they applied to waters where it deemed subsistence fishing rights existed. If the Ninth Circuit's unprecedented foray into commandeering state decision-making processes over land use or other areas of traditional state responsibility charts the correct path, this Court should say so. The *amici* States believe that the Court will say the opposite. Either way, the issue has too much importance to be left for contentious, resource-depleting litigation in judicial and administrative forums across the country.

## SUMMARY OF THE ARGUMENT

1. States have a fundamental sovereign interest in treaty or statutory provisions affecting natural resources being applied consistently with their plain scope and not expanded to create wholly new rights. The Ninth Circuit opinion breaks ground by interpreting the fishing clause to prohibit States or presumably other local governmental entities from taking land-use or other regulatory actions, or to undo past actions, that may adversely affect the amount of the harvestable fish – what a prior Ninth Circuit panel and commentators have referred to as an "environmental servitude." The court of appeals' expansive interpretation takes on added significance for *certiorari* purposes because it directly conflicts with *Fishing Vessel*'s authoritative construction that the treaty provision's twin purposes are to provide access to aboriginal fishing grounds and to apportion otherwise available

harvestable fish between tribal members and non-members. *Fishing Vessel* used the "moderate living" standard only as an absolute limit on the tribal share, not a treaty-secured entitlement which Washington must take remedial action to help achieve. That the decision's reasoning has general impact is reflected by EPA's recent reliance on it in imposing federal water quality standards under the Clean Water Act (CWA), 33 U.S.C. §§ 1251-1388, based upon statutory and treaty fishing rights in Maine and Washington.

2. The question whether the United States is subject to equitable defenses such as laches, waiver and estoppel when it enforces treaty rights has now generated two different answers in the aftermath of *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005) (*Sherrill*) – one from the Second Circuit and another from the Ninth Circuit. *Sherrill*, although arising in the context of a land claim brought by a tribe, contains an analytical structure that, as the Second Circuit has held, admits no distinction between tribes and the United States. The Second Circuit's understanding of *Sherrill* makes sense because any other result allows the federal government to escape the consequences of its own acts of omission or commission and to shift all or a portion of liability for them to a State or local government. The issue's resolution has wide importance where treaty or statutory-based claims are asserted by the United States that threaten to disrupt long-established state and local government practices or programs. This case presents an especially appropriate opportunity for clarifying *Sherrill*'s scope

in light of the United States' direct involvement in the construction of myriad culverts that it now demands Washington to remediate.

3. The district court issued, and the Ninth Circuit affirmed, an expansive permanent injunction. Its elaborate detail effectively transformed the trial court into an administrative agency – a judicial role that a 2009 Ninth Circuit *United States v. Washington* decision warned against. Beyond that core flaw, the injunction departs from settled boundaries on appropriate coercive relief against States or their officials. First, the relief ordered massive changes to the state culvert system under a single, general criterion, not through a culvert-specific assessment of benefit and cost. Second, the relief in practical effect supersedes Washington's ongoing remediation efforts to lessen its culverts' impact on salmon passage. The relief ignores limits on the federal judiciary's injunctive powers to control a State's sovereign authority over its governmental programs and, necessarily, how and when state funds are expended. This Court should reiterate the core principles of general equity practice and federalism that undergird its existing precedent if the case is remanded for further proceedings on the merits.

## ARGUMENT

### I. THE NINTH CIRCUIT'S IMPLICATION OF AN ENVIRONMENTAL SERVITUDE FROM THE TREATY FISHING PROVISION WITH RESPECT TO STREAM CULVERTS BOTH CONFLICTS WITH *FISHING VESSEL* AND CREATES THE SPECTER OF SUCH SERVITUDE'S APPLICATION TO A BROAD RANGE OF STATE AND LOCAL GOVERNMENT REGULATORY DECISION-MAKING

A. Isaac I. Stevens and Joel Palmer, then Superintendents of Indian Affairs for Washington and Oregon Territories, entered into ten treaties with Pacific Northwest Indian tribes between December 1854 and July 1855,[2] each of which reserved on- and off-reservation hunting, fishing and other usufructuary rights in largely comparable language. *See, e.g.*, Treaty with Nisquallys (Treaty of Medicine Creek), art. III, 10 Stat. 1132, 1133 (Dec. 26, 1854) ("The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory."). The fishing rights reserved under the Stevens treaties exist in Idaho, Montana, Oregon and Washington. Their scope and application have spawned substantial litigation over the last half century, with much of it now centered in two federal district court proceedings – this case and *United States v. Oregon*, No. 3:68-cv-513-KI (D. Or.). One Ninth Circuit panel, comparing the litigation below to the

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[2] This brief refers to them collectively as the Stevens treaties.

generations-long Chancery will dispute in *Bleak House*,[3] observed that "this case has become a Jarndyce and Jarndyce, with judges dying out of it and whole Indian tribes being born into it." *United States v. Washington*, 573 F.3d 701, 709 (9th Cir. 2009). The panel further observed that "the Constitution does not establish the district courts as permanent administrative agencies." *Id.*

Notwithstanding the length of the *United States v. Washington* proceeding below, this Court has addressed issues arising from it only in *Fishing Vessel*. Six decisions construing the fishing clause, however, preceded *Fishing Vessel*. *United States v. Winans*, 198 U.S. 371, 381-82 (1905); *Seufert Bros. Co. v. United States*, 249 U.S. 194, 198 (1919); *Tulee v. Washington*, 315 U.S. 681, 685 (1942); *Puyallup Tribe v. Dep't of Game*, 391 U.S. 392, 398 (1968); *Dep't of Game v. Puyallup Tribe*, 414 U.S. 44, 48 (1973); and *Puyallup Tribe, Inc. v. Dep't of Game*, 433 U.S. 165, 177 (1977). The decisions, while separated by over 70 years and applying the fishing clause in differing factual contexts, share a common thread: All construed the clause as reserving tribal access to a share of *harvestable* anadromous fish runs. The Ninth Circuit thus did not write on a clean slate. It instead re-wrote this Court's construction by imposing a burden on the State to increase the *amount* of harvestable fish; *i.e.*, it augmented the share-of-the-pie entitlement with a duty to increase the pie's size. Only this departure from the

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[3] Charles Dickens, *Bleak House* (Bradbury & Evans 1853).

Court's consistent construction of the clause allowed the Ninth Circuit to create the environmental servitude giving rise to the first question presented.

B. Beginning with the *Puyallup* trilogy, the access issue took on its modern shape of accommodating the competing demands of Indian and non-Indian fishermen to salmon and steelhead runs dramatically decreased from their treaty-time populations and needing conservation protection. As this Court would later state in *Fishing Vessel*, "it is fair to conclude that when the treaties were negotiated, neither party realized or intended that their agreement would determine whether, and if so how, a resource that had always been thought inexhaustible would be allocated between the native Indians and the incoming settlers when it later became scarce." 443 U.S. at 669.

*Fishing Vessel* built directly upon the *Puyallup* trilogy in construing the fishing clause and left no doubt about its meaning. 443 U.S. at 682-84. This Court characterized as "totally foreign to the spirit of the negotiations" the contention, proffered by one state agency, that the phrase "in common with" simply meant "[t]hat each individual Indian would share an 'equal opportunity' with thousands of newly arrived settlers" to fish. *Id.* at 676. Rather, "the purpose and language of the treaties are unambiguous; they secure the Indians' right to take a share of each run of fish that passes through tribal fishing areas." *Id.* at 679. The Court buttressed this conclusion with the *Puyallup* cases' application of the treaty provision that "clearly establish[ed] the principle that neither party

to the treaties may rely on the State's regulatory powers or on property law concepts to defeat the other's right to a 'fairly apportioned' share of each covered run of *harvestable* anadromous fish." *Id.* at 682 (emphasis added). Turning to the question of what the "share" should be, this Court "agree[d] with the Government that an equitable measure of the common right should initially divide the *harvestable* portion of each run that passes through a 'usual and accustomed' place into approximately equal treaty and nontreaty shares, and should then reduce the treaty share if tribal needs may be satisfied by a lesser amount." *Id.* at 685 (emphasis added). It even defined the term "harvestable" as the "amount of fish" remaining after "subtracting from the total number of fish in each run the number that must be allowed to escape for conservation purposes." *Id.* at 670 n.15.

This Court then pivoted to determining the "lesser amount" that would warrant a reduction of the treaty share of the harvestable anadromous runs. It credited the federal district court's basic apportionment formula of "starting with a 50-50 division and adjusting slightly downward on the Indians' side when it became clear that they did not need a full 50%." 443 U.S. at 685. The Court stressed "the 50% figure imposes a maximum but not a minimum allocation." *Id.* at 686. "[T]he central principle here must be that Indian treaty rights to a natural resource that once was thoroughly and exclusively exploited by the Indians secures so much as, but no more than, is necessary to provide the Indians with a livelihood – that is to say, a moderate

living." *Id.* The Court criticized the dissent on this point, noting that "[b]ecause the 50% figure is only a ceiling, it is not correct to characterize our holding 'as guaranteeing the Indians a specified percentage' of the fish." *Id.* at n.27. It gave an example of when "changing circumstances" could warrant a downward adjustment – a reduction in tribal membership to a level that would make a "45% or 50% allocation of an entire run that passes through [the tribe's] customary fishing grounds . . . manifestly inappropriate because the livelihood of the tribe under those circumstances could not reasonably require an allotment of a large number of fish." *Id.* at 687.

The powerful nine-judge dissent from the Ninth Circuit's denial of *en banc* rehearing rightly reasoned that "the panel opinion turns *Fishing Vessel* on its head" by "impos[ing] an affirmative duty upon the State to provide a certain quantity of fish, which reads out the 50% ceiling entirely." Pet.App. 24a. This is so because the 50% limit accommodates the modern era fact of life that population increases and related economic development have caused, and likely will continue to cause, salmon populations insufficient to support a moderate living. In defense of the panel ruling, two of its members responded that the decision did not depart from *Fishing Vessel* because "there is nothing in the [Supreme] Court's opinion that authorizes the State to diminish or eliminate the supply of salmon available for harvest." Pet.App. 10a. But that response misstates the dispositive question: whether the fishing clause, as definitively construed in *Fishing Vessel*, does

"authorize[]" the environmental servitude that the Ninth Circuit decision creates. It plainly does not. The rehearing denial concurrence also attempted to limit the potential breadth of that servitude by disclaiming "that the Tribes are entitled to enough salmon to provide a moderate living, irrespective of the circumstances," or any intent to "hold that the promise is valid against all human-caused diminutions, or even against all State-caused diminutions." *Id.* Tellingly, though, it failed to articulate any standard upon which to distinguish those "diminutions" from Washington's culvert system. One can only conclude that the true measure is the length of the Chancellor's foot. *See, e.g.*, *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 332-33 (1999).[4]

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[4] The district court's rejection of the contention "[t]he State's duty to maintain, repair or replace culverts which block passage of anadromous fish does not arise from a broad environmental servitude against which the Ninth Circuit Court of Appeals cautioned" in *United States v. Washington*, 694 F.2d 1374, 1381 (9th Cir. 1982), *vacated on reh'g*, 759 F.2d 1353 (9th Cir. 1985) (*en banc*), reflects the *ipse dixit* quality of the Ninth Circuit's holding in this case. Pet.App. 178a. "Instead," the district court explained, "it is a narrow and specific treaty-based duty that attaches when the State elects to block rather than bridge a salmon-bearing stream with a roadbed." *Id.* To be sure, the injunction pertains only to stream culverts, but the district court's explanation does not answer the real question of why stream culverts differ from other governmental (or non-governmental activities) that may negatively affect salmonid populations. The district court's failure to offer a reasoned, general standard contrasts sharply with the analysis in *Nez Perce Tribe v. Idaho Power Co.*, 847 F. Supp. 791 (D. Idaho 1994). There, a Stevens treaty tribe sought damages against a power company for construction and maintenance of

C. The Ninth Circuit's construction and application of the fishing clause thus have both Stevens treaty-specific and much wider significance. Its construction transforms the treaty right to a defined share of available harvestable fish into a right of access to an amount of harvestable fish sufficient to support a moderate standard of living. It is a short step from the latter right to creating a claim for injunctive relief against States or their officials, state political subdivisions and private parties against *any* diminishment of fish runs subject to harvest and human consumption.[5] From a

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dams that diminished anadromous fish runs from their 1855 levels. The court rejected the claim, holding that "Indian tribes do not have an absolute right to the preservation of the fish runs in their original 1855 condition, free from all environmental damage caused by the migration of increasing numbers of settlers and the resulting development of the land." *Id.* at 808. Rather, "[t]he Stevens treaties require that any development authorized by the states which injures the fish runs be non-discriminatory in nature . . . but does [*sic*] not, however, guarantee that subsequent development will not diminish or eventually, and unfortunately, destroy the fish runs." *Id.* at 814. No evidence here suggests that discrimination against tribal fishing rights tainted the design and operation of Washington's culvert system. The parties' admitted facts showed precisely the opposite; *i.e.*, the State has long recognized the impact of culverts on anadromous species' migration and taken affirmative action to reduce that impact. Pet.App. 144a-156a. Indeed, the required apportionment between treaty and non-treaty fishermen serves as a bulwark against such discrimination.

[5] Commentary on the Ninth Circuit's decision is limited thus far but recognizes its implications with respect to, *inter alia*, dams, water diversions increasing stream temperatures, timber harvests, grazing practices and sediment-producing construction projects. Michael C. Blumm, *Indian Treaty Fishing Rights and the Right to Habitat Protection and Restoration*, 92 Wash. L. Rev. 1,

Stevens treaty perspective, this expansion of the fishing clause's scope has immense consequences given the treaties' geographical reach throughout the Pacific Northwest. But the Ninth Circuit's reasoning logically extends beyond the fishing clause to any usufructuary entitlement in those treaties. So, to use the Treaty of Medicine Creek, fishing is only one of several rights reserved under Article III. The entire article provides:

> The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians in common with all

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27-33 (2017). Various commentators have discussed the potential reach of the district court's 2007 decision (Pet.App. 249a) that laid the predicate for the 2013 injunction. *See, e.g.*, Katheryn A. Bilodeau, Comment, *The Elusive Implied Water Right for Fish: Do Off-Reservation Instream Water Rights Exist to Support Indian Treaty Fishing Rights?*, 48 Idaho L. Rev. 515, 545 (2012) ("The holding in Culverts added a new dimension to the fishing litigation. With a sufficiently defined scope, treaty fishing language includes a right to protection from environmental degradation."); Michael C. Blumm & Jane G. Steadman, *Indian Treaty Fishing Rights and Habitat Protection: The Martinez Decision Supplies a Resounding Judicial Reaffirmation*, 49 Nat. Resources J. 653, 695-96 (2009) ("An 'unreasonable interference' in the context of the Stevens treaties is habitat degradation that results in decreased fish populations, which, in turn, prevents tribes from being able to make a moderate living from fishing. [¶] Thus, only activities that restrict tribes' ability to earn a moderate living from fish unreasonably interfere with the tribes' piscary profit.") (footnote omitted); William Fisher, Note, *The Culverts Opinion and the Need for a Broader Property-Based Construct*, 23 J. Envtl. L. & Litig. 491, 511 (2008) ("This case can also be viewed as a stepping stone toward the establishment of either: (1) a broad duty, such as that originally established by the district court in Phase II, or (2) several narrow duties (such as this one) directed at specific activities that harm fish passage and habitat.").

> citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting, gathering roots and berries, and pasturing their horses on open and unclaimed lands: Provided, however, That they shall not take shellfish from any beds staked or cultivated by citizens, and that they shall alter all stallions not intended for breeding-horses, and shall keep up and confine the latter.

10 Stat. at 1133. Although certain other Stevens treaties do not include the proviso, they contain the remaining rights. Carried to its natural conclusion, the Ninth Circuit's reasoning imposes an environmental servitude that prevents States or their political subdivisions from taking actions that negatively affect hunting, gathering or pasturing privileges on "open and unclaimed lands" or failing to remediate past actions that did. Requiring the United States or tribes to litigate with a scalpel, not a broadsword, does not lessen the range of activities subject to servitude.

Beyond the Stevens treaties lies the effect of the Ninth Circuit's decision in other contexts. Recent EPA actions and final rules declining to approve Maine and Washington WQS and imposing federal WQS in their stead are likely harbingers. *See* 81 Fed. Reg. 92,466 (Dec. 19, 2016) (Maine); 81 Fed. Reg. 85,417 (Nov. 28, 2016) (Washington). Maine has a nationally unique tribal-state relationship with four tribes as a result of a 1980 settlement reflected in federal and state statutes (the Maine Indian Settlement Acts). *See id.* at 92,467. In February 2015, EPA interpreted those acts

as implicitly requiring a new CWA tribal sustenance fishing designated use for unspecified Maine waters that Maine itself never adopted. *See id.* at 92,472, 92,478. In subsequent rulemaking, EPA built on this new interpretation and cited the Ninth Circuit's decision for the proposition that "it would defeat the purposes of the [settlement acts] for the tribes in Maine to be deprived of the ability to safely consume fish from their waters at sustenance levels" (*id.* at 92,479-80):

> [T]he Ninth Circuit Court of Appeals recently determined that the right of tribes in the State of Washington to fish for their subsistence in their "usual and accustomed" places necessarily included the right to an adequate supply of fish, despite the absence of any explicit language in the applicable treaties to that effect. Specifically, the Court held that "the Tribes' right of access to their usual and accustomed fishing places would be worthless without harvestable fish."

*Id.* at 92,479 (footnote omitted).[6] As to Washington, EPA found the decision, along with other cases, to support a Department of the Interior legal opinion "conclud[ing] that 'fundamental, longstanding tenets of federal Indian law support the interpretation of tribal fishing rights to include the right to sufficient water

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[6] Maine has requested repeal or withdrawal of EPA's February 2015 action underlying EPA's final rule. That request is presently pending before EPA, and Maine's pending appeal of that action has been stayed for 120 days by order entered on August 29, 2017. *Maine v. McCarthy*, No. 1:14-cv-00264-JDL (D. Me.) (ECF No. 108).

quality to effectuate the fishing right.'" *Id.* at 85,423 n.39. The same rationale has potential application to myriad treaty and statutory provisions that have subsistence-related purposes and therefore raises the specter of resource-depleting litigation like the long-lived litigation below. The petition should be granted to reaffirm the fishing clause's scope as determined in *Fishing Vessel* and remove that specter or, alternatively, to establish a standard leaving intact non-discriminatory state land-use programs, like Washington's culvert system, or other non-discriminatory regulatory measures that may have an effect on waters in which tribes have statutory or treaty fishing rights.

## II. THE SECOND AND NINTH CIRCUITS' CONFLICTING DECISIONS OVER *SHERRILL*'S APPLICABILITY TO CLAIMS BY THE UNITED STATES TO VINDICATE A TRIBE'S TREATY RIGHTS SHOULD BE RESOLVED IN THIS CASE

"Laches is 'a defense developed by courts of equity to protect defendants against unreasonable, prejudicial delay in commencing suit.'" *SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC*, 137 S. Ct. 954, 960 (2017). "A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 460 (1938). "The vital principle [for equitable estoppel] is that he who by his language or conduct leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the

expectations upon which he acted." *Dickerson v. Colgrove*, 100 U.S. 578, 560 (1879); *see also Glus v. Brooklyn E. Dist. Terminal*, 359 U.S. 231, 233-34 (1958). These equitable defenses have clear relevance here given the United States' pre-2001 conduct.

To start, the Washington State Department of Transportation (WSDOT) adhered to hydraulic culvert designs published by the Federal Highway Administration (FHWA) until Washington itself developed a stream simulation design that improved upon the federal model. Federal agencies have used the Washington design to modify their own practices. Pet.App. 137a-139a. WSDOT also has an ongoing program to remediate its salmon barrier culverts for which it has received excellence awards from the FHWA. Pet.App. 144a-155a. There is, as well, no dispute that Washington's road building activities, including culvert construction, have been ongoing for many decades. Pet.App. 139a-144a. Needless to say, tribal members and other state residents directly benefitted, and continue to benefit, from the state road infrastructure. The United States and the tribes could have challenged the State's actions as they were being undertaken or to bring proposed ameliorative measures to the state agencies' attention through sovereign-to-sovereign collaboration or asserted claims under statutes such as the CWA or the Endangered Species Act, 16 U.S.C. §§ 1531-1544.

The trial record thus contained substantial evidence that the United States partnered with Washington over many decades in culvert construction and

maintenance. The Ninth Circuit nonetheless deemed the State's equitable defenses based, *inter alia*, on that partnership unavailable "[b]ecause the treaty rights belong to the Tribes rather than the United States" and thus outside the federal government's prerogative to waive. Pet.App. 98a. *Sherrill*, it further held, "radically" differed insofar as this case did not involve a tribal claim to sovereignty over abandoned lands, a situation where the tribes had authorized the state culvert program, or a revival of "disputes that have long been left dormant." Pet.App. 99a. The Ninth Circuit's attempt to distinguish the two cases on their particular facts served at most rhetorical ends; the controlling question is whether *Sherrill* makes equitable defenses like laches, waiver and estoppel available against the United States based on *its* conduct. The Ninth Circuit answered that question with a categorical "no."

The Second Circuit, however, has reached the opposite conclusion. As it stated in *Cayuga Indian Nation v. Pataki*, 413 F.3d 266 (9th Cir. 2005), "[w]e recognize that the United States has traditionally not been subject to the defense of laches" but immediately added that "this does not appear to be a *per se* rule." *Id.* at 278. The *Cayuga* court then endorsed a set of factors formulated by the Seventh Circuit in *United States v. Administrative Enterprises, Inc.*, 46 F.3d 670 (7th Cir. 1995), governing application of laches to the United States: "first, 'that only the most egregious instances of laches can be used to abate a government suit'; second, 'to confine the doctrine to suits against the government in which . . . there is no statute of limitations';

and third, 'to draw a line between government suits in which the government is seeking to enforce either on its own behalf or that of private parties what are in the nature of private rights, and government suits to enforce sovereign rights, and to allow laches as a defense in the former class of cases but not the latter.'" 413 F.3d at 279; *see also Oneida Indian Nation v. County of Oneida*, 617 F.3d 114, 129 (2d Cir. 2010) ("*Cayuga* expressly concluded that the United States is subject to such defenses under circumstances like those presented here (*i.e.*, a lengthy delay in asserting the relevant cause of action, the absence of an applicable statute of limitations for the great majority of this delay, and an intervention to vindicate the interests of an Indian nation)."). Each factor exists here. The Ninth Circuit panel did not even acknowledge those decisions' contrary holding – as the opinion dissenting from *en banc* rehearing discussed. Pet.App. 34a-35a. This Court should grant *certiorari* to resolve the inter-circuit conflict.

## III. THE EXPANSIVE INJUNCTIVE RELIEF AWARDED BY THE DISTRICT COURT AND AFFIRMED BY THE NINTH CIRCUIT MISAPPLIED STRINGENT STANDARDS ESTABLISHED BY THIS COURT AND WARRANTS REVIEW TO REITERATE THE NEED FOR CAREFUL COMPLIANCE WITH THEM

The district court's March 2013 permanent injunction requires Washington, *inter alia*, to:

- prepare within six months a list of all culverts under state-owned roads that are salmon barriers;
- assess and identify, on an ongoing basis, culverts under state-owned roads that become salmon barriers after the injunction's issuance;
- construct new culverts on case-area "salmon waters" in compliance with the injunction's standards;
- require by October 31, 2016 three of the four state agencies managing culverts to provide fish passage in compliance with the injunction's standards;
- require WSDOT within 17 years to provide fish passage in compliance with the injunction's standards on all culverts "if the barrier culvert has 200 lineal meters or more of salmon habitat upstream in the first natural passage barrier";
- require WSDOT to provide fish passage in compliance with the injunction's standards on culverts "having less than 200 lineal meters of upstream salmon habitat at the end of the culvert's useful life, or sooner as part of a highway project, to the extent required by other applicable law";
- provide fish passage when a corrected culvert fails to provide such passage or a new culvert is added to the list of salmon barrier culverts; and

- provide tribes with sufficient notice of the salmon barrier culvert inventory, newly identified barrier culverts and correction activities "to monitor and provide effective recommendations for compliance with the [injunction's] requirements."

Pet.App. 236a-240a. The injunction, as the preceding summary indicates, specifies not only what must be done but also dictates the culvert remediation standards themselves. Pet.App. 238a-239a. The district court, finally, retains "continuing jurisdiction over this subproceeding for a sufficient period to assure that the Defendants comply with the terms of this injunction." Pet.App. 240a-241a.

The injunction fits seamlessly within not only the 2009 Ninth Circuit panel's reference to Jarndyce and Jarndyce but also its concern over federal district courts taking on the role of an administrative agency. It subjects Washington's sovereign management of its culvert system to tribal oversight and federal judicial control for potentially decades. The district court's coercive relief exacts a heavy toll from both state sovereignty and public coffers. The latter toll is staggering. The district court's findings on the remediation costs for WSDOT projects, while spare, suggest that they could range between $658,639 (for projects completed before the 2009 trial) and an estimated $1,827,168 (state expert estimate identified in the 2013 findings). Pet.App. 170a. As of March 2009, over 800 culverts under state roads had more than 200 meters of anadromous salmon habitat upstream. Pet.App. 142a.

Washington can expect, therefore, to spend in excess of one billion dollars under even a conservative assumption that actual per-culvert cost falls within the average of those amounts ($1,242,903), not considering inflation.

The petition, like the opinion dissenting from *en banc* rehearing, summarizes the injunction's palpable overbreadth. Pet. 28-32; Pet.App. 36a-41a. The *amici* States believe that two points bear particular emphasis. *First*, the district court's findings effectively attribute to state culverts salmon population impacts even though (1) those culverts constitute a small percentage of all salmon barrier culverts in the case area and (2) no evidence exists as to the ultimate increase in returning harvestable fish that the State's billion-dollar plus expenditure will generate. Multiple factors – *e.g.*, ocean conditions, non-case area harvest and non-culvert-related habitat constraints – affect available harvest. As the rehearing dissent observed, "[g]iven the significant cost of replacing barriers, . . . being forced to replace even a single barrier that will have *no tangible impact* on the salmon population is an unjustified burden." Pet.App. 39a. Obviously enough, respondents focused on state culverts because they perceived them in gross as easy targets. But the federal courts extraordinary power to issue coercive relief against States and their officials must be tailored narrowly to matching every element of the relief to an identifiable and proportionate benefit. The district court simply did not engage in the requisite cost-benefit analysis on a culvert-by-culvert basis. *See Milliken v.*

*Bradley*, 433 U.S. 267, 281-82 (1977) ("The well-settled principle that the nature and scope of the remedy are to be determined by the violation means simply that federal-court decrees must directly address and relate to the constitutional violation itself. Because of this inherent limitation upon federal judicial authority, federal-court decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate the Constitution or does not flow from such a violation, . . . or if they are imposed upon governmental units that were neither involved in nor affected by the constitutional violation[.]") (citation omitted).

*Second*, Washington has not ignored, and is not ignoring, improving culvert fish passage. In 1997, the state legislature established the Fish Passage Task Force, and since then "the state agencies have identified fish passage barriers under their roads and have accelerated the rate of correction of such barriers." Pet.App. 147a (admitted facts ¶ 3.89). Two of the state agencies had "a goal of correcting their barrier culverts by July 2016[,]" with "the level of funding" as "[t]he primary factor determining the rate at which the State can correct fish barrier culverts." Pet.App. 148a (admitted facts ¶¶ 3.90 and 3.92). The district court's failure to defer to the state process does not square with this Court's admonition in the seminal *Rizzo v. Goode*, 423 U.S. 362 (1976):

> When a plaintiff seeks to enjoin the activity of a government agency, even within a unitary court system, his case must contend with

> "the well-established rule that the Government has traditionally been granted the widest latitude in the 'dispatch of its own internal affairs[.]' . . . The District Court's injunctive order here, significantly revising the internal procedures of the Philadelphia police department, was indisputably a sharp limitation on the department's "latitude in the 'dispatch of its own internal affairs.'" [¶] When the frame of reference moves from a unitary court system, governed by the principles just stated, to a system of federal courts representing the Nation, subsisting side by side with 50 state judicial, legislative, and executive branches, appropriate consideration must be given to principles of federalism in determining the availability and scope of equitable relief.

*Id.* at 378-79 (citations omitted); *see Lewis v. Casey*, 518 U.S. 343, 385-86 (1996) (Thomas, J., concurring) ("Broad remedial decrees strip state administrators of their authority to set long-term goals for the institutions they manage and of the flexibility necessary to make reasonable judgments on short notice under difficult circumstances. . . . At the state level, such decrees override the 'State's discretionary authority over its own program and budgets and forc[e] state officials to reallocate state resources and funds to the [district court's] plan at the expense of other citizens, other government programs, and other institutions not represented in court.'") (citations omitted). This Court should grant *certiorari* as to the third question presented to reiterate clearly-established equity and

federalism principles in the event that remand proceedings on the merits are ordered.

## CONCLUSION

The petition for writ of *certiorari* should be granted.

Respectfully submitted,

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September 2017